UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*,	)	
	)	No. 12 CR 94
v.	)	
	)	Hon. Judge Norgle
MICHAEL VILLAGRAN, *Defendant*.	)	

DEFENDANT VILLAGRAN'S MOTION FOR NEW TRIAL

NOW COMES the Defendant, Michael Villagran, by and through his attorney, the Law Offices of Ralph J. Schindler, Jr., and, pursuant to Federal Rule of Criminal Procedure 33, does hereby respectfully request that this honorable Court grant Defendant a new trial. The arguments presented below are made without the benefit of a transcript of proceedings. While such transcripts have been ordered, at the time for this filing such transcripts were not ready.

On August 15, 2013, after a three (3) day trial, a jury convicted Villagran of one count of Bank Robbery. It is respectfully requested that this Court should grant Defendant a New Trial based on certain errors set forth below.

I. Competency Examination

Mr. Villagran professes to be a "Sovereign Citizen" and not subject to the jurisdiction of this court. Due to his disruptive behavior, the court ordered Mr. Villagran to submit to a competency examination. The first examination was conducted by the staff psychologist at the Metropolitan Correctional Center who issued his report finding Mr. Villagran competent to stand trial. Appointed defense counsel then moved for the appointment of a Defense Psychiatrist and the court appointed Dr. Stephen Dinwiddie to perform the examination. However Dr. Dinwiddie was only able to meet once with Mr. Villagran for approximately 20 minutes just before the 3:00 p.m. shut down at the MCC and when he returned for a second visit, Mr. Villagran refused to meet with him. Thus Dr. Dinwiddie was forced to issue a report based on minimal information. Although Dr. Dinwiddie concluded that Mr. Villagran was competent to stand trial, his report was based on a records review only and the 20 minute visitation. It is respectfully submitted that the Court was required by the statute and the Constitution to hold a hearing after eliciting the opinion of experts on behalf of both parties and to make a determination about Villagran's competency to stand trial only after such hearing and only based on the facts elicited at that hearing. 18 U.S.C. §§ 4241 4247; *United States v. Deters*, 143 F.3d 577, 583-584 (10th Cir. 1998); *In re Newchurch,* 807 F.2d 404 (5th Cir. 1986); *Marcey v. Harris*, 400 F.2d 772 (D.C. Cir. 1968); *United States v. Gomez-Borges*, 91 F. Supp. 2d 477 (D.C. P.R. 2000).

II. Right to Self Representation

Appointed Counsel filed a motion to Clarifiy Appointed Counsel's Role (Dkt#67). In such motion it was represented that the Defendant initially permitted counsel to consult with him regarding this case; that in one visit Defendant denied making any post arrest statement (though there appears to be a post arrest statement) and denied knowledge of the bank robbery. Further it was represented that since those initial discussions Defendant has refused to allow undersigned counsel to visit him at the MCC to discuss the case and has refused to come to court for various status hearings. The Defendant has persisted in filing *pro se* documents purporting to be "UCC notices" and other "proofs". (Docket #17, 21, 44, 45, 47, 54, 56, 59, and 61.) One of these, Docket #45, is Defendant's Offer of Proof that undersigned counsel is incompetent to represent Defendant. Defendant has sent such "Notices" to this honorable court and to the Assistant United States Attorney assigned to this case. The only correspondence undersigned counsel has received from Defendant has been "notices" similar to those sent to the court. Other than the initial brief discussions, Defendant has not assisted undersigned counsel in any way in preparing his defense. Undersigned counsel was able to confer with Defendant's wife and other family members about Defendant's case in order to attempt to prepare a defense.

In response to counsel's Motion, the court ordered Mr. Villagran brought into court to determine whether he wanted to represent himself or have the assistance of counsel. During the proceeding, Mr. Villagran again became somewhat disruptive and then refused to speak further to the court. When inquiry was made as to whether he wished appointed counsel to continue to represent him, Mr. Villagran remained silent. The court construed his silence as an acquiescence to the continued representation. Undersigned counsel respectfully submits that the record was inadequate to indicate a waiver of his professed desire to represent himself. In any event, it is clear that Mr.

Villagran refused to assist appointed counsel in the defense of his case. He refused to come to court and was ordered to come to court. He was brought to court chained to a wheelchair in his orange jump suit and refused to cooperate with the Marshall's Service. He refused to wear the clothing that defense counsel had obtained for him for trial from the Federal Defender's Office. Thus he appeared before the jury in his orange jump suit. When all others stood for the entrance or exit of the jury, Mr. Villagran sat. While the court instructed the jury to make no inference from Mr. Villagran's clothing, it is respectfully submitted that this would be hard to do for most people.

In total, it is respectfully submitted that the above events denied defendant of a fair trial and form the basis for Defendant's request for a new trial.

III. The Money Issue

As the court will recall, the Government at trial essentially proved its case by the fact that Defendant was found with eight $100 bills on him at the time of his arrest, the exact number of bills that were taken from the bank. The government made great mention in closing argument that Villagran was found with "exactly $800" on his person. In rebuttal at closing argument the prosecutor mocked the argument of defense counsel and asked the jury what were the chances that such a "coincidence" should occur: the bank is robbed of $800 and Mr. Villagran is found a few minutes later with "exactly" $800 in his pocket.

Following trial undersigned counsel met with Candy Rendon, Mr. Villagran's wife, when she was approached by FBI Agent Hoogland. Agent Hoogland wanted to return to her Mr. Villagran's personal property taken pursuant to his arrest. This included his wedding ring, cell phone, link card, sunglasses, a scrap of paper with some numbers written on it and a small amount of cash. It is submitted that the small amount of cash was of significance. Likewise the presence of sunglasses. This inventory of personal effects was not disclosed to undersigned counsel. Had the additional cash and sunglasses been known, it is submitted that undersigned counsel could have defended the government's argument by arguing that he wasn't found with exactly $800 but with $801.56. Likewise, in the government's discovery, it appears that the bank robber left behind in the Cermak Market a pair of sunglasses. Though the TCF video showed the robber wearing no sunglasses, it appears that a pair of sunglasses was found in the vicinity of where the robber allegedly left his articles of clothing. Why would Villagran have two pairs of sunglasses if he was, in fact the robber? Why leave one pair in Cermak Market and another pair in your pocket?

Likewise, the evidence was clear that the serial numbers of the bills taken was not known. The government's argument of this great "coincidence" was improper given the facts known to the government and highly prejudicial in what is respectfully submitted was a close case. While the "coincidence" argument may have referred to the eight $100 bills and not to the total amount of money defendant had on his person at the time of his arrest, it is suggested that the argument was improper and disclosure of the personal effects should have been made. It was not true that Villagran had "exactly $800" on his person when he was arrested. He had $802 or some similar amount of funds on him at the time of his arrest and there was no proof that the eight $100 bills he was arrested with were the same bills taken during the robbery.

IV. Opinion Testimony

Prior to trial Counsel had filed its motion for notice of the use of expert testimony. (Dkt #69). In the motion Defendant requested that, pursuant to Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure, the government disclose a written summary of any testimony it intends to use under Fed. R. Evid. 702, 703, and 705 during its case in chief. The government indicated that they would present no expert testimony and made no disclosure.

At trial the government called Mr. Vincente Blas as a witness and introduced a recording made of a phone call from the MCC. The government sought to introduce the recording as a recording of Villagran's "confession". Objection was made on relevance and hearsay grounds in that the records of the MCC indicated that the phone call was from a prisoner other than Villagran and that the call was charged to this other inmate's account. The government said that they would tie this up and the recording was admitted into evidence but not published.

Following Mr. Blas, the government called FBI Agent Hoogland and inquired whether he was familiar with Mr. Villagran's voice. He stated that he was, based on his conversations. He was asked if he had reviewed the CD made from the MCC phone call and could identify any of the participants. He stated that he could and he identified Mr. Villagran as one of the speakers. Based on his opinion the recording and transcript of the recordings were published to the jury. It is respectfully submitted that such opinion should have been disclosed prior to trial but was not, that such failure to identify this key piece of opinion testimony was error, and that a new trial should be granted. While voice identification generally falls under Rule 901(b)(5) of the Federal Rules of Evidence, it is respectfully submitted that such authenticating or identifying opinion should have been disclosed prior to trial, and was not.

V. Admission of Government Exhibit 2; Proof of Insurance

At trial the government introduced Government Exhibit 2. The government stated that it was "self authenticating" and the court immediately accepted it into evidence without inquiring if there was any objection. Government Exhibit 2 is a duplicate of a document purporting to bear the seal of the FDIC and certifying that the deposits of each depositor in TCF National Bank, Sioux Falls South Dakota are insured under the FDIC. The certificate in numbered as 28330 and purports to bear the signature of the Executive Secretary and Chairman of the Board of the FDIC. It is respectfully submitted that the document id not adequate under Rule 902 and Crawford v. Washington, 541 U.S. 36 (2004) in that it was "testimonial" and essential to prove an essential element of the government's case, that the bank was FDIC insured.

Following such admission, David Nelson, the security officer of TCF was called to the stand and the recordings of video were introduced into evidence. The security officer also testified that he was familiar with the status of the bank's FDIC insurance and that each branch was insured, including the branch in Aurora, that he was responsible for making sure that each teller counter had a small plaque which indicated that the deposits of the branch were insured by the FDIC.

It is respectfully submitted that the issue of whether this branch of the TCF bank was insured by the FDIC was beyond the scope of his function as security officer for TCF and should not have been admitted. Originally the government had presented in discovery a certification signed by Ann Laterra of the FDIC. She also appeared on the government's witness list. The discovery document was a certification signed by Ann Laterra which states that she is a Notary Public and that she was notarizing the Affidavit of Thomas Nixon who swears that the TCF Bank is insured by the FDIC. At trial the government decided not to call Ann Laterra as a witness. Instead it sought to establish the essential element of FDIC insurance through this document and the testimony of the TCF security officer. No notice of his opinion was provided to Defendant that this would be the substance of his testimony. It is respectfully submitted that the opinion expressed was beyond the scope of his employment and constituted an opinion that fell into the realm of Section 702 and should have been disclosed. Further it is submitted that the FDIC certificate of insurance was improperly admitted as a self authenticating document

VI. CONCLUSION

As stated above, counsel has prepared this Motion without the benefit of the actual transcript of proceedings. It is respectfully requested that the court allow this motion to be expanded or amended should additional grounds for relief become apparent based on a review of the transcript when it becomes available. In any event, in light of the factors set forth above, it is respectfully requested that the court grant Defendant a New Trial.

Respectfully submitted,

/s/*Ralph J. Schindler, Jr.*

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